No. 15928

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES D. BOBBROFF,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Nevada

BRIEF ON BEHALF OF APPELLANT

CHARLES WILLIAM TESSMER,
1002 Fidelity Bldg.,
Dallas, Texas,
Attorney for Appellant.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

INDEX

No. 15928

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES D. BOBBROFF,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Nevada

BRIEF ON BEHALF OF APPELLANT

JURISDICTION OF THE COURT OF APPEALS

The pleadings in this case consist of the Motion to Vacate Sentence. The judgment in this case consists of the trial court's Order, overruling the Motion to Vacate Sentence and the Judgment based thereon.

Jurisdiction of the trial court and of the Honorable Court of Appeals is invoked by virtue of *Title 28, U. S. C. A., Section 2255.* (Appendix A., R. 19.)

STATEMENT OF THE NATURE AND RESULT OF THE CASE

Appellant was found guilty in the United States District Court for the District of Nevada of violation of Counts 3, 4, 5 and 8 of an indictment. Counts 3, 4 and 5 charged the use of the mails in an offer to dispose of, to three shareholders in a Nevada corporation, Eversharp Launwhiz, Inc., further shares therein by employing a scheme to defraud in violation of the Securities Act of 1933, *15 U. S. C. A., Sec. 77q(a) (1)*. Count 8 charged a similar use of the mails in an attempt to sell further shares to another shareholder of Eversharp Launwhiz, Inc. in violation of the mail fraud Statute, *18 U. S. C., Sec. 1341*. On February 25, 1953, the United States Court of Appeals, Ninth Circuit, affirmed the judgment *202 F. 2d 389*.

The question of the ineffective cumulation of the Sentences imposed was not presented in the original appeal.

Appellant filed Civil Action No. 1358, a statutory motion to vacate sentence and said motion was overruled by the trial court on January 28, 1958, and said order and judgment was filed on the 20th day of January, 1958. Appellant gave notice of appeal within the time allowed by law and the case is properly before the Honorable Court of Appeals for a decision on the merits. Appellant deems the motion to vacate sentence (R. 3) as a complete, concise, abstract statement of the case and the questions involved herein.

The attention of the Honorable Court is respectfully invited to said motion (R. 3).

Appellant, by motion to vacate the judgment and sentence entered in Cause No. 12153 in the District Court of the United States for the District of Nevada, takes the position that the attempt to cumulate Count 3 and the sentence imposed thereon, with other counts in the indictment in the above numbered and styled cause, was ineffective because the cumulation attempted was vague, indefinite and uncertain, for the following reasons:

(1) The order of sequence of serving the sentences is not provided for.

(2) The sentences imposed on two of the concurrent counts are for different periods of time, that is to say, 5 years and 3 years to be served concurrently, and there is no provision that the sentence imposed on Count 3 is to cumulate with Count 5 or with other counts which were for 3 years instead of 5 years, thereby rendering said sentence uncertain.

(3) There is no provision when the commencement of the sentence on Count 3 is to begin, that is to say, when the 5-year sentence terminates or when the 3-year sentence would terminate, and for that reason, the cumulation is ineffective.

(4) The judgment will not support the actual sentence of the Court, which is reflected by the reporter's transcript of the Minutes at the sentencing of Appellant, for the

reason that the judgment expressly provides that Count 3 will run consecutive with Count 5, while the sentence contains no such provision.

Appellant has served a sufficient length of time to completely satisfy all counts of the indictment, except Count 3, to which Appellant makes the claim of an ineffective cumulation.

EVIDENCE

The evidence in this case consists of Appellant's Exhibit No. 1, same being a certified copy of the official minutes of the United States District Court in the original Cause No. 12153, Criminal, as reflected by the shorthand reporter's notes of the comments of the Court in imposing the sentence on Appellant. Appellant's Exhibit No. 2, being a statement of time served from the Federal Correctional Institution at Seagoville, Texas. Appellant's Exhibit No. 3, a certified copy of the Judgment as entered in Cause No. 12153, Criminal.

SPECIFICATIONS OF ERROR

SPECIFICATION OF ERROR NO. 1

That the Judgment and Sentence in the original Cause No. 12153, Criminal, in the District Court for the United States for the District of Nevada, will not support a cumulation of the sentences attempted to be imposed against defendant-appellant, because the sentences attempted to be imposed were vague, uncertain and indefinite and did not

provide for the proper sequence of serving and expressly provided in the judgment that said sentences were to run consecutive with one another.

SPECIFICATION OF ERROR NO. 2

That the Judgment and Commitment do not conform to the actual sentence of the District Court, which consists of the reporter's transcript of the proceedings of October 5, 1951, same being the actual judgment in the case and the Judgment and Commitment as reflected by the minutes of the Clerk dated October 5, 1951, which was the ministerial judgment entered upon the sentence previously imposed.

SPECIFICATION OF ERROR NO. 3

That the District Court erred in overruling defendant-appellant's motion to vacate sentence for the reason that the attempted cumulation of Count 3 with the other counts in the original indictment against appellant is ineffective and is not supported by the documentary evidence adduced at the hearing before the trial court.

SPECIFICATION OF ERROR NO. 1—(Restated)

That the Judgment and Sentence in the original Cause No. 12153, Criminal, in the District Court for the United States for the District of Nevada, will not support a cumulation of the sentences attempted to be imposed against defendant-appellant, because the sentences attempted to be

imposed were vague, uncertain and indefinite and did not provide for the proper sequence of serving and expressly provided in the judgment that said sentences were to run consecutive with one another.

STATEMENT

Appellant deems the Specification of Error as a sufficient statement of the point of law relied upon.

ARGUMENT AND AUTHORITIES

Judgments in criminal cases are the pronouncements from the bench and neither the commitment or the clerk's entry is the judgment. *Walden v. Hudspeth, 115 F. 2d 558; Bowie v. King, 137 F. 2d 495; Watkins v. Merry, 106 F. 2d 360; Wilson v. Bell, 137 F. 2d 716; Berman v. U. S., 302 U. S. 211.*

Defendant's Exhibit No. 1 (R. 7) provides in substance as follows:

> "So it is the judgment of the Court that the defendant is guilty of the offense charged in the 5th count of the indictment, which I think you understand is a rather long charge, covers matters that are set forth in the first count. You were here in court, of course, every moment of the trial, you know very well what the 5th count contains. It refers particularly to your depositing in the mail matters forwarded and addressed to Mrs. Gertrude Olness. You are adjudged guilty of that offense and you are, for that offense, committed to the custody of the Attorney General for the period of five years and fined in the sum of two thousand dollars. On the charge contained in the third count, you are adjudged guilty of that offense and you

are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. On the charge contained in the 4th count of the indictment, you are adjudged to be guilty by virtue of the verdict of the jury, and you are hereby committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. By virtue of the verdict of the jury, you are adjudged guilty of the charge contained in the 8th count and for that charge in the count you are committed to the custody of the Attorney General for the period of three years and fined in the sum of one thousand dollars. The sentences imposed on Count 4 will be concurrent with that imposed on Count 5, so far as the imprisonment is concerned. The sentence imposed on Count 8 is concurrent with the sentence imposed on Count 5, insofar as the imprisonment is concerned. The total term of imprisonment is eight years. The total fine imposed is five thousand dollars. You are fined one thousand dollars on Count 3; you are fined two thousand dollars on Count 5; on Count 8 you are fined one thousand dollars; on Count 4 you are fined one thousand dollars. The sentence imposed on the third count is consecutive. So the defendant is remanded to the custody of the marshal."

An analysis of this sentence reveals the following chronological facts with reference to the sentence:

(1) On Count 5 of the indictment, 5 years, fined the sum of Two Thousand Dollars.

(2) On Count 3, 3 years and a fine in the amount of One Thousand Dollars.

(3) On Count 4, 3 years confinement and One Thousand Dollars Fine.

(4) On Count 8, 3 years confinement and One Thousand Dollars fine.

The Court then goes on to state, the sentences imposed on Count 4 be concurrent with that imposed on Count 5, so far as the imprisonment is concerned. The sentence imposed on Count 8 is concurrent with the sentence imposed on Count 5, insofar as the imprisonment is concerned. The *total term of imprisonment is eight years.*

At this point, the Court did not cumulate the sentence to arrive at the figure of eight years. In the next to last sentence of the Sentence imposed, we find the following: "The sentence imposed on the third count is consecutive."

It is apparent from a reading of the sentence that what the Court did was first assess a sentence on all four counts that could not possibly exceed 5 years, that being the term imposed on the Fifth count. Then the court made a computation of arithmetic with reference to the four preceding counts, arriving at the figure eight years, without any cumulation being mentioned at that point in the sentence. Then the Court went on to state that Count 4 would be concurrent with Count 5 and that Count 8 would be concurrent with Count 5 as to imprisonment and then the court again repeated that the total imprisonment was 8 years without specifying when the sentence was to begin, which count was to run first, etc. There can be no other conclusion but that the sentence and judgment as reflected by Defendant's Exhibit No. 1 set out above, is completely vague, indefinite and uncertain and could not impose a greater sentence than 5

years as imposed on Count 5 in the sentence. The Honorable Trial Court in its Opinion, Findings of Fact and Conclusions of Law (R. 32), poses a question as to which should control, the official transcript of the shorthand reporter's notes of the sentence imposed from the bench or the clerk's notes made at the time of the rendition of the sentence. It is submitted that the authorities set out above answer this question and it is not open to doubt that the official shorthand notes of what transpired in the courtroom should control over the clerk's recollection as to what transpired.

From the Court's Findings of Fact and Conclusions of Law (R. 32), the following:

> "In Exhibit No. 3 herein, minutes of Court, among other things, we find the following:
>
> > "* * * IT IS FURTHER ORDERED that the prison sentence imposed on Count 4 will run *CONCURRENTLY* with the prison sentence imposed on Count 5; and that the prison sentence imposed on Count 8 will run *CONCURRENTLY* with the prison sentence imposed on Count 5; and that the sentence imposed on Count *3 will run CONSECUTIVELY with the sentence imposed on Count 5;* the total prison sentence is 8 years and the total fine is $5,000.00. * * *."

This quotation from the judgment itself, brings Appellant's case squarely within the rule announced by this court in *Bledsoe v. Johnson, 154 F. 2d 458, 459 (9 C. C. A.), Cert. Den., 66 Supreme Court, 1367, 328 U. S. 872, 90 L. Ed. 1642*, wherein it was stated:

> "The controversy is whether the sentences were to be served concurrently or consecutively. Each sentence

signed by the District Judge read that it is to run consecutively with the other. Obviously, here is no effective judgment for consecutive sentences."

The word "with" in the *Bledsoe* case is the same verbiage that is used in the Court's judgment in the above numbered cause. It is apparent from an examination of the Court's sentence in this cause and from an examination of the judgment entered in this cause that there is an ambiguity and uncertainty with reference to the intent to cumulate the punishment. It is unquestioned that there is no provision in the sentence as to when the cumulative punishment, if any, is to begin, and this is especially uncertain where the imprisonment on other counts was for different periods of time.

In *United States v. Patterson, C. C., 29 F. 775*, Mr. Justice Bradley of the Supreme Court, sitting in Circuit, considered a case in some respects similar. The accused had plead guilty to three indictments for three separate offenses, as had the present appellant. He was sentenced "for the term of five (5) years upon each of the three indictments * * * said terms not to run concurrently * * *." He served one term of five years, was continued in detention, and sought release through habeas corpus proceedings. Describing the questioned language of the sentences as equivalent to "the said terms shall follow each other successively," Mr. Justice Bradley nevertheless held the sentences to be for a total of only five years because the language referred to was "incapable of application to the respective terms,

without specifying the order of their succession * * *." The Justice explained:

> "If they are successive, which one? That which is first to be executed, or that which is secondly or thirdly to be executed? No intelligence is sufficient to answer the question. A prisoner is entitled to know under what sentence he is imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, and as insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered.
>
> * * * * *
>
> "* * * As neither of them was made to take effect after the one or the others, they all took effect alike; that is, from the time of the rendering of judgment * * *."

Agreeing that a court has a right "to extend its judgment and proceedings on the record in proper form, regardless of imperfections in the minutes of its clerk," the Justice went on to say that in the case before him,

> "there are no materials in existence for altering the form of the judgment under consideration—at least nothing but what may rest in the bosom of the judge; and for him to resort to his memory at this day to alter the judgment would be to render a new judgment."

United States v. Daugherty, 269 U. S. 360, 46 S. Ct. 156, 70 L. Ed. 309, involved sentences on three counts of the same indictment for five years on each count, to be *consecutive and not concurrent.* The Supreme Court implied the order of consecutiveness, saying:

> "The judgment here questioned was sufficient to impose total imprisonment for 15 years, made up of three 5-year terms, one under the first count, one

> under the second and one under the third, to be served consecutively and to follow each other in the same sequence as the counts appeared in the indictment. This is the reasonable and natural implication from the whole entry."

The Court distinguished Patterson on the ground that in Patterson the sentences grew out of "three separate indictments," saying, "the question there was materially different from the one here presented, which concerns counts in one indictment." (See Fed. Rules Criminal Procedure, Rule 13. Pleas to separate indictments no different than pleas to separate counts of same indictment.)

It seems, therefore, that under Patterson, thus distinguished but not disapproved, the sentences pronounced in open court in the present cases as "consecutive" without more, were satisfied when Count 5, the specified term had been served. F. R. C. P. Rule 13 was promulgated after *U. S. v. Daugherty.*

On the question of the uncertain sentence, the following cases are cited:

> *Holt v. Sanford, 101 F. 2d 290, 5 C. C. A.*, opinion by Judge Foster. In this case the appellant had pled guilty to two indictments in the Southern District of Mississippi, one indictment charging four counts of resisting a Federal Officer and the other indictment in four counts charging violations of the Federal Liquor Law. On indictment 4436, a sentence was imposed as follows: "It is therefore ordered, considered and adjudged by the Court that the said defendant be confined in the U. S. Penitentiary at Atlanta, Ga., for a period of 10 years from the date of delivery, whereupon proper process will issue." On indictment 4351 the following sentence was imposed: It is therefore

considered and adjudged by the Court that the said defendant be confined in the U. S. penitentiary at Atlanta, Ga., for a period of 5 years from the date of delivery whereupon proper process will issue. The sentence imposed in this case is to run continuously with the sentence imposed in Case No. 4436. The commitment or mittimus read in part that he was to be confined in the Federal Penitentiary at Atlanta, Ga., for a period of 15 years from the date of delivery, the mittimus being signed by the Clerk and not the Judge. The court stated "Sentence in a criminal case should be clear and definite construing the entire judgment imposed and the sentence must be considered rather than one particular word." U. S. v. Daugherty, 269 U. S. 360. If its meaning is doubtful the presumption arises that it is to be served concurrently with another sentence imposed at the same time. 15 American Jurisprudence, Section 465, Criminal Law. The word continuously may have different meanings according to the context of the writing in which it appears. So far as we have been able to ascertain as used in a sentence of imprisonment the word has not been judicially defined except by the District Court in this case. The trial court has authority to make the sentences run consecutively or concurrently. Those words are generally used to indicate the intention of the Court. A strong presumption may be indulged that the use of the word continuously in the case was a clerical error, committed by the Clerk, as its use is so unusual it is doubtful that it was intentionally used by the Judge. If the sentences had been silent as to whether they were to run consecutively or concurrently, they would have run concurrently from the date the prisoner was delivered to the penitentiary. 18 U. S. C. A., Section 709a. Both sentences clearly provide that the terms of imprisonment are to run from date of delivery to the penitentiary. They cannot be construed to run consecutively without violating that provision. Following the definitions relied upon by the District Court in con-

struing the word continuously to mean without interruption it would be a reasonable conclusion that it was the intention of the trial court that the sentence of four years should not be interrupted and postponed by the service of the sentence of ten years. While the commitment states the term of imprisonment to be 15 years, that is purely the act of the clerk. A commitment depends upon the validity of the judgment behind it. A mittimus is controlled by the judgment. Hill v. Wampler, 298 U. S. 460, case was reversed and remanded.

The judgment or sentence must be definite and clear. See U. S. ex rel Chasteen v. Denemark, 138 Fed. 2d 289 (7 C. C. A.) where the Court sought to make the sentence consecutive with the sentence imposed in No.....with no further designation as to the Court, offense, etc.

Biddle v. Hall, 15 Fed. 2d 840 (8 C. C. A.)—two indictments were plead to on the same day. Sentences were alleged to be imposed on the same day and that they should not be concurrent. Court held this insufficient and uncertain to render the sentences to be served consecutively. See also Wagner v. U. S., 3 Fed. 2d 864 (9 C. C. A.)—a sentence of three months and a fine or a sentence of five months if fine not paid held uncertain and bad.

From *Millard v. U. S., 148 Fed. 2d 154*, the following:

"We think though, that the provision of the sentence that the first term shall not commence until the imprisonment for nonpayment of the fine, has in some way come to an end as too indefinite and depends on too many contingencies to be valid and effective. It is true that by exact specification as to when each term shall begin, in appearance it conforms to the rule that where sentences are imposed on pleas of guilty on several counts of the same indictment in the same court, unless the sentences so imposed are to run concurrently, there must be some definite specific pro-

vision that the sentences shall run consecutively, specifying the order of the sequence. Citing Howard v. U. S. 75 Fed. 986 (6 C. C. A.), 34 L. R. A. 509; U. S. v. Patterson, C. C. 29 Fed. 775; Boyd v. Archer, 9 C. C. A., 42 Fed. 2d 43, 70 A. L. R. 1507; Daugherty 269 U. S. 360, 362; Pacinelli v. U. S., 9th Circuit, 5 Fed. 2d, page 6."

SUMMARY

It is respectfully submitted that this Specification of Error No. 1, clearly reflects that the attempt to cumulate the sentence imposed upon Count 3 of the indictment was totally ineffective. Tested by all of the authorities cited above and construing the sentence in favor of the liberty of the accused and that no presumptions will be indulged in to sustain the sentence or judgment, The Honorable Trial Court was in error in not vacating the sentence and judgment as imposed upon Count 3 of the indictment and ordering the discharge of appellant from custody.

SPECIFICATION OF ERROR NO. 2—(Restated)

That the Judgment and Commitment do not conform to the actual sentence of the District Court, which consists of the reporter's transcript of the proceedings of October 5, 1951, same being the actual judgment in the case and the Judgment and Commitment as reflected by the minutes of the Clerk dated October 5, 1951, which was the ministerial judgment entered upon the sentence previously imposed.

STATEMENT

Appellant feels that the Specification of Error is sufficiently definite to explain Appellant's position in the matter.

ARGUMENT AND AUTHORITIES

Judgments in criminal cases are the pronouncements from the bench and neither the commitment or the clerk's entry is the judgment. *Walden v. Hudspeth, 115 F. 2d 558; Bowie v. King, 137 F. 2d 495; Watkins v. Merry, 106 F. 2d 360; Wilson v. Bell, 137 F. 2d 716; Berman v. U. S., 302 U. S. 211.*

It has clearly been established that there is a variance between the actual judgment and sentence as reflected by the shorthand reporter's notes and the formal judgment which was later entered, based upon the minutes as taken by the clerk. Under all of the authorities cited, the pronouncement from the bench as reflected by the shorthand reporter's notes, is the judgment. In the absence of a correct formal judgment based upon the pronouncement from the bench, the Appellant is illegally restrained of his liberty and the restraint should be vacated by this Honorable Court.

Appellant recognizes that there is a remedy to correct a formal judgment, which is at variance with the judgment and sentence of the court as pronounced from the bench. See *Aderhold v. McCarthy, 65 F. 2d 452 (5 C. C. A.); Montgomery v. U. S., 165 F. 2d 196; Former Appeal, 134 F. 2d, page 1*, describing the proper remedy for correction of uncertain sentence and providing for presence of the accused and taking of testimony. The rule in this Court of of Appeals appears to have been laid down in *Bledsoe v. Johnson, 154 F. 2d 458*, that the sentence may be corrected only by record evidence and not by parole.

SUMMARY

It is apparent that should the Honorable Court hold that the pronouncement from the bench as reflected by the shorthand reporter's notes, constitutes a definite and sufficient judgment to cumulate the punishment in Count 3 of the indictment (which we question), then there is no proper formal judgment for the following reasons:

(1) The formal judgment, Exhibit 3, does not follow the pronouncement of Exhibit 1, the actual judgment and sentence.

(2) There being no formal judgment, Appellant is illegally restrained and the Motion to Vacate his sentence should have been granted.

(3) The only other action that could have been taken, which the trial court did not do, was to attempt to correct the formal judgment as entered.

The state of the record should thus entitle Appellant to have the sentence imposed against him on Count 3 vacated in the absence of a proper formal judgment.

SPECIFICATION OF ERROR NO. 3—(Restated)

That the District Court erred in overruling defendant-appellant's motion to vacate sentence for the reason that the attempted cumulation of Count 3 with the other counts in the original indictment against appellant is ineffective and is not supported by the documentary evidence adduced at the hearing before the trial court.

STATEMENT

Appellant's argument and authorities as set out under Specification of Error No. 1 is germane to this Specifica-

tion of Error and the attention of the Honorable Court is respectfully invited thereto.

CONCLUSION

It is respectfully submitted that Appellant-Petitioner has served his lawful sentences and is entitled to an order vacating the sentence on Count 3 in Cause No. 12153, and an order discharging him from further confinement at the Federal Correctional Institution, Seagoville, Texas. There being no valid judgment conforming to the sentence imposed in the above cause is a further basis for immediate discharge.

Respectfully submitted,

.....

CHARLES WILLIAM TESSMER,
1002 Fidelity Bldg.,
Dallas, Texas,
Attorney for Appellant.

CERTIFICATE

I, Charles William Tessmer, hereby certify that on this, the ..... day of April, 1958, three copies of Appellant's Opening Brief were served upon the United States District Attorney for the District of Nevada, by mailing to his office at P. O. Box 1889, Las Vegas, Nevada, postage prepaid.

CHARLES WILLIAM TESSMER,
Attorney for Appellant.

APPENDIX A

Exhibits: Page

APPENDIX B

Title 28, U. S. C. A., Sec. 2255:

Federal custody; remedies on motion attacking sentence:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial

or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Sec. 114, 63 Stat. 105."